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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Siskiyou)

KLAMATH RIVER DEVELOPMENT CO. et al., Plaintiffs and Respondents; ROBERT PRESTON et al., Plaintiffs, Cross-Defendants and Respondents; PHILIP CICALA, Cross-Defendant and Respondent, v. SUSAN WALLACE, Defendant and Appellant; KLAMATH RIVER COUNTRY ESTATES OWNERS ASSOCIATION, INC., Defendant, Cross-Complainant and Appellant.	C054002 C055369 (Super. Ct. No. SCCVCV031984)

Disagreements between members of defendant Klamath River Country Estates Owners Association, Inc. (Association) culminated in a flurry of litigation. When the newly elected Association board of directors (Board) raised assessments,

plaintiff homeowners and former Board members filed suit to enjoin the increase. The Association cross-complained, alleging plaintiffs breached their fiduciary duty as Board members by having previously kept assessments artificially low.

A jury concluded the Board improperly raised assessments and directed the Association to reimburse plaintiffs. On the cross-complaint, the jury found no breach of duty. The court awarded attorney fees to the cross-defendant who had funded the defense. On appeal, the Association argues the court erred in excluding documentary evidence and testimony by the Association's experts. The Association also contends the court erred in instructing the jury, and the verdict forms were incorrect. Finally, the Association challenges the award of attorney fees. We shall affirm the judgment and reverse the order after judgment awarding attorney fees.

FACTUAL AND PROCEDURAL BACKGROUND

The Setting

Klamath River Country Estates (Estates) is a common interest development under Civil Code section 1351.[1] Single-family residences make up the Estates, which consists of approximately 2,040 lots and commonly owned areas.

The Association, a mutual benefit nonprofit corporation, owns 29 miles of roads, a clubhouse, a swimming pool, an office building, a campground, and other improvements and equipment.

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[1] All further statutory references are to the Civil Code unless otherwise indicated.

Each lot owner within the Estates is a member of the Association and pays an assessment per lot.

Approximately 15 percent of the Estates's lots are improved and serve as primary residences. The other 85 percent of the lots are unimproved and are owned by absentee owners.

The seven-member Board runs the Association. The Board exercises all corporate powers and control over its business. The Board annually considers the current and future needs of the Association and, accordingly, adopts a budget and imposes an assessment against each lot to cover operating expenses and repairs. (§ 1365.)

In 1992 one of the plaintiffs, Klamath River Development Co. (Development Company), acquired the approximately 635 remaining lots of the Estates, which comprised about 30 percent of the total number of lots. Philip Cicala is the Development Company's president and principal, and subsequently became a member of the Board.[2]

The Development Company purchased the lots for resale and sold lots to many of the plaintiffs. Many, if not all, of the lots had failed percolation tests and therefore would not support a traditional septic system. This limitation was disclosed to the buyers before they purchased their properties. A schism thus existed between owners of lots that served as

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[2] Cicala is not a plaintiff but was named as a cross-defendant. He served on the Board from 1991 through September 2002. Cicala was reelected to the Board in 2003 and remained through August 2005.

primary residences and absentee owners of unimproved lots, including many with soils unsuitable for conventional waste disposal systems. Owners of primary residences, who constituted the minority of owners, sought to insure that roads and other improvements were adequately maintained.[3] The remaining owners were less concerned with the condition of the roads and less willing to bear the expense of road maintenance. The Development Company bore the brunt of the assessments for maintenance and improvements.

The Assessment Imbroglio

When the Development Company purchased the remaining lots in 1992, the annual assessment on each lot was $57. In 1991 an Association member filed suit for declaratory relief and mandamus to compel the Board to prepare annual pro forma operating budgets in accordance with section 1365, subdivision (a) (the prior litigation). The suit also sought to require the Association to include its private roads and other major components in statutorily mandated reserve studies and to adequately fund repairs.

In 1982 civil engineer James G. Bray prepared a roads report for the Association. Bray estimated the cost of bringing the Association's roads up to safe all-weather condition at $1.45 million. Bray recommended the Association spend $131,000 per year maintaining the roads once they were repaired.

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[3] According to Cicala, about 55 percent of the Association members have lots on county owned and maintained roads.

In August 1992 the Association took a vote regarding a special assessment for road improvement and maintenance. A majority of the members, 904 to 25, voted to reject the special assessment. A majority, 887 to 63, also voted in favor of maintaining the roads in their current status, with a 20-year plan to upgrade the roads.

In November 1993 the directors voted to raise the annual assessment by $3, from $57 to $60 a year, beginning in 1994. The assessment remained at $60 a year from 1994 until 2002.

In 1994 the court entered a judgment against the Association in the prior litigation. The court found the Association was obligated to repair and maintain the subdivision's 29 miles of private roads. In 1997 the plaintiff in the prior litigation filed an order to show cause regarding the Association's failure to obey the judgment and peremptory writ of mandate. That year the Association spent over $130,000 on road repair.

In September 2002 Cicala, plaintiff Robert Preston, and another director resigned from the Board. A new Board was elected that included many of the current defendants.

In November 2002 the Board adopted a budget that raised assessments for the 2003 fiscal year from $60 to $72 per lot, a 20 percent increase.

The Litigation Morass

The Development Company and seven owners of lots within the Estates, three of whom were former Board directors (collectively, plaintiffs), filed suit against the Association

and several of the new Board members, arguing the assessment increase was illegal under the Association's bylaws and the Davis-Stirling Common Interest Development Act (Act; § 1350 et seq.). Plaintiffs sought a refund of $12 per lot.

The Association filed a cross-complaint against five of its former directors for breach of fiduciary duty, fraud, constructive fraud, and negligent misrepresentation. The cross-defendants raised the business judgment rule as a defense.

A jury trial followed. Prior to trial, plaintiffs raised two defenses as in limine motions. Plaintiffs argued the Association lacked the capacity to maintain the action based on its failure to comply with the Act, and asserted the statute of limitations. The court concluded triable issues of fact existed as to both defenses and deferred ruling. The court stated that the motion would be reconsidered as a motion notwithstanding the verdict if the jury returned a verdict for the Association.

At trial, plaintiffs objected to the assessment increase on various grounds. Plaintiffs did not receive a copy of the announcement of the intention to increase the assessment, they were not given an opportunity to vote on the increase, and they paid the increase under protest to avoid liens on their properties.

Cicala testified the assessment increase was invalid because the Association's bylaws required a vote of the members. In addition, he stated the increase violated section 1366 and former section 1365, subdivision (a)(4) because the pro forma

budget was not distributed to Association members at least 45 days prior to January 1, 2003.[4]

The Association acknowledged the late distribution of the budget but argued the increase was legally adopted in accordance with section 1366, subdivision (b)(1) and (2).[5]

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[4] Former section 1365, subdivision (a)(4) (as amended by Stats. 1990, ch. 716, § 1) provides, in pertinent part: "Unless the governing documents impose more stringent standards, the association shall prepare and distribute to all of its members the following documents: [¶] (a) A pro forma operating budget, which shall include all of the following: [¶] . . . [¶] (4) A general statement addressing the procedures used for the calculation and establishment of those reserves to defray the future repair, replacement, or additions to those major components that the association is obligated to maintain. [¶] The summary of the association's reserves disclosed pursuant to paragraph (2) shall not be admissible in evidence to show improper financial management of an association, provided that other relevant and competent evidence of the financial condition of the association is not made inadmissible by this provision. [¶] A copy of the operating budget shall be annually distributed not less than 45 days nor more than 60 days prior to the beginning of the association's fiscal year."

Further, section 1366, subdivision (a) provides: "Except as provided in this section, the association shall levy regular and special assessments sufficient to perform its obligations under the governing documents and this title. However, annual increases in regular assessments for any fiscal year, as authorized by subdivision (b), shall not be imposed unless the board has complied with subdivision (a) of Section 1365 with respect to that fiscal year, or has obtained the approval of owners, constituting a quorum, casting a majority of the votes at a meeting or election of the association conducted in accordance with Chapter 5 (commencing with Section 7510) of Part 3 of Division 2 of Title 1 of the Corporations Code and Section 7613 of the Corporations Code. For the purposes of this section, 'quorum' means more than 50 percent of the owners of an association."

In addition, the Association argued that if section 1366, subdivision (a) controlled, plaintiffs' unclean hands barred their suit. The Association also contended it had substantially complied with the statutory requirements.

Exclusion of Experts

Prior to trial, the parties exchanged demands for designation of experts. The Association designated four experts; plaintiffs did not designate any. The Association sought to introduce expert testimony from Bray, who prepared the road studies; Linnea Juarez, an author of books on the financial aspects of community associations and common interest developments; Roy Helsing, an authority on common interest

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[5] Section 1366, subdivision (b)(1) and (2) provides: "Notwithstanding more restrictive limitations placed on the board by the governing documents, the board of directors may not impose a regular assessment that is more than 20 percent greater than the regular assessment for the association's preceding fiscal year or impose special assessments which in the aggregate exceed 5 percent of the budgeted gross expenses of the association for that fiscal year without the approval of owners, constituting a quorum, casting a majority of the votes at a meeting or election of the association conducted in accordance with Chapter 5 (commencing with Section 7510) of Part 3 of Division 2 of Title 1 of the Corporations Code and Section 7613 of the Corporations Code. For the purposes of this section, quorum means more than 50 percent of the owners of an association. This section does not limit assessment increases necessary for emergency situations. For purposes of this section, an emergency situation is any one of the following: [¶] (1) An extraordinary expense required by an order of a court. [¶] (2) An extraordinary expense necessary to repair or maintain the common interest development or any part of it for which the association is responsible where a threat to personal safety on the property is discovered."

developments; and David Levy, a certified public accountant who provides accounting services for numerous community associations and has authored handbooks on the subject.

Plaintiffs objected to the experts' testimony at trial, arguing their opinions were inadmissible because they relied on hearsay documents or unauthenticated documents. Plaintiffs also argued their opinions would be unduly prejudicial.

The Association offered to authenticate the business records that were provided to the experts. In addition, the Association argued many of the documents relied on by its experts were the sort of reliable records that such experts are allowed to consider in forming their opinions.

The trial court excluded the testimony of three of the Association's experts on two grounds. First, the court had previously ordered copies of all expert reports, exhibits, and PowerPoint presentations to be provided to opposing counsel. The Association failed to provide hard copies of the PowerPoint presentations to be used by two of its experts. The court cited this failure to comply as one basis for excluding the experts.[6]

Second, the court found the experts' opinions potentially prejudicial and speculative, and based upon possibly

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[6] Contrary to the representation of plaintiffs' counsel at oral argument, the trial court did not cite the Association's general failure to provide discovery or comply with court orders as a basis for excluding the experts; only the failure to provide hard copies of the PowerPoint presentations is mentioned in the record.

inadmissible hearsay. The court found such testimony would mislead the jury.

The Association asked that the experts be allowed to testify without the PowerPoint presentations. The court refused the request. The Association also requested a brief court hearing to make an abbreviated presentation of the experts' testimony; again, the court denied the request. The court did allow Bray, the civil engineer, to testify.

Exclusion of Documents

The Association sought to introduce letters from counsel and Department of Real Estate reports. The court excluded the documents as inadmissible hearsay. The court also denied the Association's request to admit the reports under Evidence Code section 1280.

Subsequent Proceedings

The Association dismissed three causes of action and proceeded against plaintiffs solely on the breach of fiduciary duty cause of action.

The jury found the Association violated former section 1365 and/or section 1366 and awarded plaintiffs the value of the assessment increases on each of their properties. The jury found the Association and defendant Wallace acted with malice, oppression, or fraud and added 7 percent compounded prejudgment interest to the awards.

On the Association's cross-complaint, the jury found two of the plaintiffs breached their fiduciary duties to the Association. The jury awarded $2,536.07 to the Association

against one plaintiff but nothing against the other. The jury found none of the cross-defendants acted with malice, oppression, or fraud.

The court denied the Association's motions for a new trial and for judgment notwithstanding the verdict. The Association filed a timely notice of appeal.

Attorney Fees

Both parties requested costs. The court found plaintiffs were the prevailing parties and awarded them costs of $14,982.01. The court also awarded plaintiffs attorney fees of $186,185 under Civil Code section 1354, subdivision (c) and Corporations Code section 317, subdivision (d). The Association filed a timely notice of appeal from the attorney fees judgment. This court consolidated the two appeals.

DISCUSSION

EXCLUSION OF DOCUMENTS

Attorney Letters

The Association sought to introduce two letters from its former attorneys, Ralph Collins and Curtis Sproul, to show Cicala, one of the former directors and president of the Development Company, had notice the assessments were too low. The Association argued these documents called into question Cicala's good faith and credibility in denying any knowledge that revenues needed to be raised.

The trial court excluded both letters as inadmissible hearsay and on the additional ground that they were "extremely prejudicial" opinion. The Association contends that since the

attorney letters were offered for nonhearsay purposes, the court erred in excluding them.

All relevant evidence is admissible unless specifically excluded by statute or by the federal or California Constitution. Relevant evidence may be excluded pursuant to Evidence Code section 352 if the trial court in its discretion concludes its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, confuse the issues, or mislead the jury. We will not overturn a trial court's decision to exclude such evidence absent an abuse of that discretion. (*People v. Basuta* (2001) 94 Cal.App.4th 370, 386.)

The Association argues the attorney letters were offered for the nonhearsay purpose of showing Cicala had notice of the road conditions and the pro forma budget requirements. Not much evidence was required to establish that Cicala, president of the Development Company with more than a decade's tenure on the Board, had notice of the road conditions and knowledge of budget requirements. But even accepting the letters were relevant and probative on the issue of notice, their potential impact far exceeded this limited issue.

Sproul's letter contains numerous legal opinions. It states the Act "clearly requires that the Association undertake an analysis of capital repair, maintenance and replacement needs, including an assessment of the useful life of capital components [and] develop a plan for funding major repairs and

replacements as needed. The . . . Association currently has no such plan and one should be developed. [¶] . . . [¶] The final concern I would have . . . is the liability exposure of community association directors . . . ." Sproul concluded: "[T]he business judgment rule does not protect . . . directors from individual liability . . . ."

The Collins letter was written in 1992, after Collins, as the Association's counsel, took the deposition of the plaintiff in the prior litigation. In the letter, Collins states his opinions about the Association's legal obligations and his thoughts on the outcome of the case.

The Association argues that where, as here, out-of-court statements are offered for a nonhearsay purpose, they are admissible. According to the Association, it offered the letters on the issue of the good faith and reasonableness of Cicala's actions as a member of the Board, and as evidence Cicala was put on notice of his duties as a director. The letters show that Cicala did not rely on counsel's advice, but ignored it and acted in bad faith.

Despite the Association's arguments, we find no error in the exclusion of the letters. As noted, the trial court has the discretion to exclude even relevant evidence if its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice.

The trial court's exercise of its discretion on the issue will not be disturbed on appeal absent a clear showing of abuse. While no precise definition of "abuse of discretion" exists, the

appropriate test is whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered. We will not reverse the trial court merely because reasonable people might disagree. Absent a clear showing that the decision was arbitrary or irrational, we presume the trial court acted to achieve legitimate objectives and, accordingly, its discretionary determinations ought not to be set aside on review. (*Gouskos v. Aptos Village Garage, Inc.* (2001) 94 Cal.App.4th 754, 762.)

We disagree with the Association's contention that the letters had "virtually no chance of creating prejudice of the type contemplated by [Evidence Code] Section 352." There is ample basis for the court's conclusion that the letters were "extremely prejudicial."

The letters bore the imprimatur of legal opinions by Association attorneys, opinions certain to have a major impact on the jurors' consideration of the case. The legal opinions expressed raised the danger of undue prejudice, confusion, and time consumption on the part of the jury, justifying their omission under Evidence Code section 352.

Department of Real Estate Report

Business and Professions Code section 11010 requires any person who intends to offer subdivided lands for sale to file an application for a public report with the Department of Real Estate. The notice of intention that is a required component of the public report must contain certain specified information. (§ 11010, subds. (a) & (b).) Thereafter, the Real Estate

Commissioner makes an examination of the subdivision and, unless there are grounds for denial, issues a public report containing the data obtained in accordance with section 11010 that the commissioner determines necessary. (Bus. & Prof. Code, § 11018.) A copy of the public report must be given to prospective purchasers of subdivided lands, including common interest subdivisions. (Bus. & Prof. Code, § 11018.1.)

The Association sought to introduce Development Company's 1992 Department of Real Estate amended public report, 1999 Department of Real Estate amended public report, and 2001 Department of Real Estate amended public report. The Association argued the reports were admissible as public records, for the truth of the matters stated, and as business records for the nonhearsay purpose of showing notice, knowledge, and good faith. The court excluded the reports, finding they did not fall within the hearsay exception to Evidence Code section 1280. The Association argues the trial court abused its discretion in excluding the reports.

Evidence Code section 1280 permits public records to be admitted only if "all of the following applies: [¶] (a) The writing was made by and within the scope of duty of a public employee. [¶] (b) The writing was made at or near the time of the act, condition or event. [¶] (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

Here, the reports the Association sought to introduce were produced in conjunction with Business and Professions Code

sections 11018 and 11010. The Development Company provided the information used in the reports, information that was required to be correct and current. Failure to provide information would have subjected the Development Company to possible fines and criminal penalties. (Bus. & Prof. Code, § 11023.) The Commissioner prepared the public report based on information the Development Company provided. Given these facts, the trustworthiness requirements of Evidence Code section 1280 permitting the admission of public records were met. The public reports were made by and within the scope of duty of a public employee, and each report was made at or near the time of the act, condition, or event. Finally, the sources of information and method and time of preparation were such as to indicate their trustworthiness. Thus, the trial court erred in excluding the reports.

An appellant has the burden of demonstrating both that the evidence at issue was erroneously excluded and that the error was prejudicial. Evidentiary rulings will be deemed harmless if the record demonstrates the judgment was supported by the rest of the evidence properly admitted. (See *Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1122.)

The Association argues the exclusion of the public reports was prejudicial because had the reports been admitted, the jury "would have viewed Cicala's testimony in a different, less favorable light [and] would have found Cicala had breached his fiduciary duty to [the Association]." According to the Association, the public reports reflected the "annual assessment

was too low to adequately fund the operating expenses and reserve fund needs."

However, the jury had before it evidence of the 1992 report by civil engineer Bray, in which Bray stated it would cost $1.45 million to bring the subdivision's roads up to safe all-weather condition. The jury was also aware that the Development Company disregarded recommendations to increase spending on roads from 1992 to 2002. In addition, the 2001 reserve study indicated the capital reserves fund was underfunded.

Given the evidence already before the jury, the public reports merely reiterated the Association's claims that defendants and cross-defendant Cicala were on notice that road repairs were not adequately funded. The trial court's decision to exclude the reports, although erroneous, was therefore not prejudicial.

EXCLUSION OF EXPERTS

The Association argues the court erred in excluding the testimony of three of its experts. We review for an abuse of discretion a trial court's exclusion of experts. (*People v. Bui* (2001) 86 Cal.App.4th 1187, 1196.) It is fundamental that the trial court has wide discretion to admit or reject opinion evidence, and we have no power to interfere with that ruling unless there is an obvious and pronounced abuse of discretion on the part of the trial court. (*Westbrooks v. State of California* (1985) 173 Cal.App.3d 1203, 1210.)

In addition, whether an expert's opinion should be held inadmissible as based on matter that is not the proper basis for

opinion testimony depends upon the extent to which the improper considerations have influenced the expert's opinion. Again, such questions are addressed to the sound discretion of the trial court. (*County Sanitation Dist. v. Watson Land Co.* (1993) 17 Cal.App.4th 1268, 1277 (*County Sanitation*).)

Here, the trial court excluded three of the Association's experts for two reasons: as a sanction for violation of court orders regarding the exchange of expert reports (the Association failed to provide hard copies of PowerPoint presentations), and because the experts did not form their opinions based on personal knowledge, but upon potentially unreliable and prejudicial information provided by the Association.

Reliability of Experts

Prior to the court's ruling, the parties discussed at length the proposed testimony of the Association's three experts: Juarez, Levy, and Helsing. Plaintiffs objected to their testimony, arguing their opinions were based on hearsay and other unreliable and prejudicial documents that were not produced under any business records exception. Plaintiffs also pointed out some of the documents the experts relied upon were almost 15 years old.

In excluding the experts the court stated: "But I do think that these expert opinions are so -- potentially so prejudicial and so speculative and based upon hearsay, a lot of hearsay information that may or may not be admissible, that I just think that they're so inherently unreliable that they're going to really mislead the jury."

Experts may not rely on inadmissible hearsay in formulating their opinions when that reliance produces testimony more prejudicial than probative. "'When the expert's opinion is not based on matter perceived by or personally known to him, but depends on information furnished by others, the opinion will be of little value unless the source is reliable.'" (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1524 (*Korsak*), quoting 1 Witkin, Cal. Evidence (3d ed. 1986) The Opinion Rule, § 472, p. 448.) Experts may not relate out-of-court statements of another as independent proof of a fact. Nor may an expert, under the guise of reasons for an opinion, bring before the jury incompetent hearsay evidence. (*Korsak*, at pp. 1524-1525.)

In deciding whether to permit expert testimony, the court's main concern is the purpose for which the material is presented. Expert evidence should be excluded when the expert lacks sufficient personal knowledge and an adequate basis for formulating a relevant expert opinion notwithstanding his or her general qualifications. (*Korsak*, *supra*, 2 Cal.App.4th at p. 1525; *People v. Ramos* (1997) 15 Cal.4th 1133, 1175.) With these tenets in mind we consider the proposed testimony of each of the Association's three excluded experts.

Juarez

Juarez, who authored books about the financial aspects of community associations and common interest developments, would testify that, in her opinion, the Association acted reasonably, as other directors confronted with similar circumstances might have done, in adopting the assessment increase and complying

with former section 1365 and section 1366. According to Juarez, plaintiffs' and Cicala's actions fell below acceptable standards and procedures applicable to the collection of past-due assessments and fees. Plaintiffs' and Cicala's actions caused the Association to lose assessment revenues.

Juarez formed her opinions based upon Association annual budgets for the period 1992 to 2004 and upon Department of Real Estate public reports, including those from 1992 and 1999. However, the Association provided no custodian of records for any period prior to 2002 to establish the reliability of the prior Association annual budgets. Susan Wallace, the custodian since 2002, had no access to records prior to her election to the Board. Reliability of the records could not be presumed. Wallace stated the records were incomplete and missing following the 2002 Board election. In addition, over 20 boxes of records had been burned at Wallace's direction after the 2002 election.

Juarez relied on hearsay contained in unauthenticated documents in forming her opinion as to the propriety of the actions of the parties. Nothing in Juarez's declaration states she possessed any independent knowledge of the facts underlying her opinions. Instead, she formulated her opinions based on unreliable documents.

We give wide latitude to trial courts in determining whether the matters relied upon by experts in forming opinions are too speculative. (*Redevelopment Agency v. First Christian Church* (1983) 140 Cal.App.3d 690, 703.) The court acted well

within its discretion in determining Juarez's testimony to be prejudicial and potentially misleading.

Levy

Levy, a certified public accountant, would testify that plaintiffs and Cicala failed to conform to the standards of practice for homeowners association accounting, including adequacy of assessments, determination of reserve requirements, and bookkeeping relating to reserve accounts. Levy would also testify as to how the directors could have avoided damage to the association.

Levy also relied on "more than 10 years of board of director minutes," Association "annual budgets for the period of 1992 to 2004," and the 1992, 1999, 2001, and 2004 Department of Real Estate public reports. However, these minutes were never authenticated, leaving open the question of who drafted them, when they were drafted, or whether they accurately reflect the meetings in question. In addition, as discussed, the budgets, many of which were missing, also suffered from a lack of authentication.

Given the unreliable nature of the documents on which Levy based his opinions, the trial court did not err in concluding his expert testimony was inadmissible. As with Juarez, Levy's proposed testimony carried the potential for misleading the jury. Moreover, expert testimony based on speculative hearsay is prejudicial and properly excluded. An expert's opinion cannot be based on facts that find no support in the evidence, or upon irrelevant and speculative matters. (*Williams v.*

Volkswagenwerk Aktiengesellschaft (1986) 180 Cal.App.3d 1244, 1262-1263.)

Helsing

Helsing would testify that plaintiffs' and Cicala's conduct fell below applicable standards of practice related to reserve funding plans and assessments. Helsing would explain how reserve study results are used to determine a funding plan that becomes part of the annual budget. Helsing would testify that plaintiffs' and Cicala's actions breached their duties of loyalty and due care. These actions represented extreme bad faith, fraud, and an intent to deceive.

Helsing relied on the same documents that Levy did. As with Levy, the court acted well within its discretion in excluding Helsing's testimony.[7]

The Association quotes authority for the proposition that "'[i]t is prejudicial error to exclude relevant and material expert evidence where a proper foundation for it has been laid, and the proffered testimony is within the proper scope of expert opinion.' [Citation.]" (*People ex rel. Dept. of Transportation v. Clauser/Wells Partnership* (2002) 95 Cal.App.4th 1066, 1086.) According to the Association, "The proper foundation was laid, or could have been laid, for

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[7] We note the trial court did not exclude the three experts based on their lack of qualifications, but based upon the speculative nature of their proposed testimony. The Association cites cases discussing the issue of expert qualifications, which are not applicable in the present case.

Appellants' experts. They proffered testimony which was within the proper scope of expert opinion and based, in part, on the types of documents on which they, and other experts in their fields, regularly rely."

Where expert opinion is offered, much must be left to the discretion of the trial court in deciding whether to admit or exclude it. (*People v. McDonald* (1984) 37 Cal.3d 351, 373.) Whether an expert's opinion should be held inadmissible as based on matter that is not the proper basis for opinion testimony depends upon the extent to which the expert bases his or her opinion on those sources. Such questions are addressed to the sound discretion of the trial court. (*County Sanitation*, *supra*, 17 Cal.App.4th at p. 1277.)

Here, the Association failed to lay a proper foundation for the documents relied upon by its experts. No witness authenticated the Board's minutes or budget documents. Nor did the Association provide a scenario under which it could authenticate these documents. Under these circumstances, the court did not act arbitrarily or abuse its discretion in excluding the expert testimony.[8]

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[8] Since we find no error in the court's exclusion of the Association's experts based on the substance of their testimony, we need not address the Association's arguments concerning the propriety of excluding the experts as a discovery sanction.

INSTRUCTIONAL ERROR

Breach of Fiduciary Duty and Substantial Compliance

The Association contends the court improperly rejected its requests to give correct instructions on breach of fiduciary duty and the defense of substantial compliance. Although the Association acknowledges the court instructed pursuant to Corporations Code section 7231.5 concerning the liability of nonprofit volunteer directors, it argues the court erred in not giving a plethora of other instructions on fiduciary duty. In reply to plaintiffs' assertion that the fiduciary duty standard applicable to volunteer directors of a nonprofit is different than that for other corporations, the Association insists that plaintiffs are wrong and the trial court erroneously subscribed to their error. We are not persuaded.

The Supreme Court in *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, 265 (*Lamden*) announced the standard applicable in the present case: "We hold that, where a duly constituted community association board, upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas, courts should defer to the board's authority and presumed expertise." In effect, *Lamden* imposed a deferential "business judgment" standard over the more intrusive standard of "objective reasonableness."

The instructions sought by the Association went far beyond the director's duty under the rule enunciated in *Lamden*. The Association requested instructions on duties, foreseeability of harm, requisite care, duty of care including supervisory responsibility, shifting of the burden of proof to the director when there is evidence the director secured an advantage, and the presumption of fraud when a fiduciary gains an advantage.

According to the Association, the court's failure to more fully instruct the jury regarding breach of fiduciary duties "beyond the business judgment rule" was prejudicial because the requested instructions would have put the fiduciary duty issue in more specific context. We disagree and find the court correctly instructed the jury under the standard set forth in *Lamden*.

The Association also argues the court should have given a "substantial compliance" instruction. Substantial compliance means actual compliance in respect to the substance essential to every reasonable objective of the statute. Where there is compliance as to all matters of substance, technical deviations are not to be given the stature of noncompliance. Substance prevails over form. When a party embarks on a course of substantial compliance, every reasonable objective of the statute at issue has been satisfied. (*Cal-Air Conditioning, Inc. v. Auburn Union School Dist.* (1993) 21 Cal.App.4th 655, 668.)

However, the Association cites no authority for the proposition that the substantial compliance rubric applies to

the Act. The pertinent provision of the Act requires that a budget be distributed "not less than 45 days nor more than 60 days prior to the beginning of the association's fiscal year." (Former § 1365, subd. (a)(4), prior to 2004 amendment.) The statute is specific and no substantial compliance instruction was necessary to inform the jury of the applicable law.

Statute of Limitations

The Association faults the court's instruction on the applicable statute of limitations. The Association requested an instruction using November 12, 2003, the filing date of the complaint, as the end of the four-year breach of fiduciary duty limitations period. The court instructed that the period ended in October 2004, when the cross-complaint was filed. According to the Association, had the court not given the erroneous instruction, the jury could have considered plaintiffs' conduct for an additional 11 months in determining whether they breached their duty to the Association.

The statute of limitations relates back to the filing of the underlying complaint if the parties are the same in both the complaint and cross-complaint. It does not relate back in cases in which the cross-complaint includes new parties not named as plaintiffs. (*Trindade v. Superior Court* (1973) 29 Cal.App.3d 857, 859-860 (*Trindade*).) Here, cross-defendant Cicala was not a named plaintiff in the complaint.

In addition, the relation back doctrine applies only if the complaint and the cross-complaint arise from the same

transaction, matter, happening, or contract. (*Trindade*, *supra*, 29 Cal.App.3d at pp. 859-860.) Here, the complaint sought reimbursement of assessments levied by the Board in November 2002. The cross-complaint alleged breach of fiduciary duty based on alleged conduct dating back to 1991. The complaint and cross-complaint are based on different facts and circumstances. Therefore, the court did not err in instructing on the statute of limitations period.

Section 1366

The Association contends the trial court erred by omitting subdivision (d) when instructing the jury under section 1366. The court did instruct pursuant to section 1366, subdivisions (a) and (b).

Section 1366, subdivision (d) sets forth the notice requirements of an assessment increase, which are not less than 30 or more than 60 days prior to the assessment increase becoming due. According to the Association, if the court had instructed on section 1366, subdivision (d), the jury might have found the assessment increase valid because the Association timely gave notice to members not less than 30 days or more than 60 days prior to the increased assessment becoming due on February 1, 2003.

However, the Association failed to request the court to instruct on section 1366, subdivision (d).[9] Moreover, the

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[9] At oral argument, the Association's counsel insisted he requested the trial court to instruct on section 1366,

Association relied upon the emergency exception in section 1366, subdivision (b) as the court so instructed. Since the Association neither requested nor relied on subdivision (d), the court did not err in instructing on section 1366.

The Act and Bylaws

The Association argues the trial court should have instructed the jury that the Act controlled over the Association's bylaws. Again, the Association failed to request such an instruction.

Nor was the court under a duty to so instruct sua sponte. Section 1366, subdivision (b) provides that annual increases in assessments shall not be imposed unless the board complies with section 1365, subdivision (a) or has obtained "the approval of owners, constituting a quorum, casting a majority of the votes at a meeting . . . ."

Since the budget was not delivered a sufficient number of days before January 1, 2003, the only option remaining for the Board was to obtain a vote of the majority of the members approving an increase. The Board never held such a vote. Given the facts, there was no conflict between the Act and the bylaws and no necessity for the court to instruct on the Act's primacy over the bylaws.

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subdivision (d) but acknowledged the request might have been made during an unreported conference in chambers. Plaintiffs' counsel denied that a request was ever made. We are bound by the record of trial, which contains no mention of a requested instruction on subdivision (d).

VERDICT FORMS

Unclean Hands

The Association argues the court erred in failing to include the defense of unclean hands in the special verdict form regarding the assessment increase. The court declined the request, stating it would not "clutter up" the special verdict form with affirmative defenses. The court informed counsel it could argue affirmative defenses to the jury and instructed the jury on the Association's unclean hands defense.

We review special verdicts de novo. A special verdict requires the jury to resolve all of the controverted issues in the case, unlike a general verdict, which merely implies findings on all issues in one party's favor. (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 678 (*City of San Diego*).)

The Association argues there was ample evidence that plaintiffs had unclean hands, which delayed the Association's adoption of the pro forma budget for 2003 and the assessment increase. Therefore, the Association was entitled to a factual question on the special verdict form on this affirmative defense.

As noted, the court did instruct on the affirmative defense of unclean hands. The Association cites no authority for the proposition that a trial court must include an affirmative defense on the verdict form. Instead, the Association relies on *City of San Diego*.

In *City of San Diego*, the jury made findings that the same property had two different fair market values. The appellate court reversed for a new trial, noting: "'The inconsistent verdict rule is based upon the fundamental proposition that a factfinder may not make inconsistent determinations of fact based on the same evidence.'" (*City of San Diego*, *supra*, 126 Cal.App.4th at p. 682, quoting *Cavallaro v. Michelin Tire Corp.* (1979) 96 Cal.App.3d 95, 101.) Here, the Association points to no inconsistency in the jury's verdict regarding its claim of unclean hands.

Sections 1365 and/or 1366

The Association also contends the court erred in approving a special verdict form that asked the jury whether the Association violated "Civil Code Sections 1365 and/or 1366" and thereby "prejudicially mixed the issue of the adoption and notice of the assessment increase in with the separate issue of timely distribution of the budget." According to the Association, impermissible inconsistent verdicts resulted from the error.

We disagree. The verdict form accurately refers to sections 1365 "and/or" 1366 because violation of either section supported the refund of payment for assessments made by plaintiffs under protest. The Association did not raise this issue in its motion for a new trial and never asserted the verdict was inconsistent. This belated argument is without merit.

ATTORNEY FEES

The Association challenges on several grounds the trial court's award of attorney fees. Recovery of attorney fees is permitted when authorized by contract or statute. (*City of Santa Paula v. Narula* (2003) 114 Cal.App.4th 485, 488.) We review an order granting or denying an award of attorney fees under an abuse of discretion standard. However, the determination of whether the criteria for an award of attorney fees and costs have been met is a question of law. (*Salawy v. Ocean Towers Housing Corp.* (2004) 121 Cal.App.4th 664, 669.)

Section 1354

The Association argues the trial court erred in awarding attorney fees based on section 1354, subdivision (c) because the Act does not provide for an award of attorney fees to a prevailing party based on violations of section 1365 or 1366. According to the Association, the Act superseded the Association's bylaws pertaining to adoption of an assessment increase.

Section 1354 of the Act provides, in pertinent part: "(b) A governing document other than the declaration may be enforced . . . by an owner of a separate interest against the association. [¶] (c) In an action to enforce the governing documents, *the prevailing party shall be awarded reasonable attorney's fees and costs.*" (Italics added.)

In the present case, plaintiffs' complaint included a cause of action for "breach of the governing documents and the Davis-Sterling [*sic*] Common Interest Development Act." Plaintiffs

alleged the Association violated sections 1365 and 1366, and various provisions of the Association's governing documents.

Here, the jury found the Association violated sections 1365 and/or 1366 when it increased the 2003 assessment from $60 per year, per lot to $72 per year, per lot. Plaintiffs prevailed, but based on the statutory violation and not based on breach of the governing documents. Under the circumstances, the award of attorney fees under section 1354 for fees incurred in connection with the complaint challenging the increased assessment was erroneous.

Corporations Code Section 317

Finally, the Association argues plaintiff Development Company was not an officer or director of the Association and therefore Corporations Code section 317, subdivision (d) provides no legal basis for an award to Development Company or Cicala for attorney fees.

Corporations Code section 317, subdivision (d) provides: "To the extent that an agent of a corporation has been successful on the merits in defense of any proceeding referred to in subdivision (b) or (c) or in defense of any claim, issue, or matter therein, the agent shall be indemnified against expenses actually and reasonably incurred by the agent in connection therewith."

Corporations Code section 317, subdivision (c) states: "A corporation shall have power to indemnify any person who was or is a party . . . to any threatened, pending, or completed action by or in the right of the corporation to procure a

judgment in its favor by reason of the fact that the person is or was an agent of the corporation, against expenses actually and reasonably incurred by that person in connection with the defense . . . of the action if the person acted in good faith . . . ." Corporations Code section 317, subdivision (d) requires the corporation to indemnify the former agents for all "expenses actually and reasonably incurred" in connection with a failed action against them for fraud, negligence, or breach of fiduciary duty.

Here, the court awarded Development Company and Cicala as prevailing parties expenses incurred as former "agent[s] of the corporation" who were unsuccessfully sued by the Association.

The Association argues Corporations Code section 317, subdivision (d) does not apply because Development Company was not "an agent" of the Association. However, the Association fails to explain why Cicala, as Development Company's sole shareholder, was not an agent of the Association. Indeed, in opposing the attorney fees motion, the Association stated: "Philip Cicala was an 'agent' of [the Association] within the meaning of Section 317(d). *If* Cicala had incurred expenses, [the Association] would have been required to indemnify him against the 'expenses actually and reasonably incurred' by him in connection with his successful defense on the merits. However, Cicala did not actually incur any expenses -- [Development Company] did."

The Association renews this argument on appeal, contending Development Company, not Cicala, incurred the expenses

reimbursed by the attorney fees award. In the trial court, plaintiffs argued that Cicala and Development Company were jointly liable for attorney fees under the fee agreements with plaintiffs' counsel and that Development Company is a private corporation wholly owned by Cicala. In addition, Cicala had arranged to reimburse Development Company for all expenses it advanced in the litigation. The trial court found these arguments persuasive, and so do we.

Amount Awarded

The Association disputes the amount awarded as attorney fees, arguing an unresolved fee dispute occurred between Development Company and its former attorneys, Greenberg Traurig. According to the Association, "[i]n light of [Development Company's] insistence that [Greenberg Traurig's] billings were excessive, and where substantial fees remained unpaid based on the fee dispute, it was unwarranted for the lower court to rule that all fees and costs incurred by [Development Company] were reasonable and necessary."

Reasonable attorney fees are fixed by the court, and what constitutes a reasonable fee is committed to the trial court's discretion. The experienced trial judge is the best judge of the value of the professional services rendered in his or her court, and while his or her judgment is subject to our review, we will not disturb that judgment unless we are convinced it constitutes an abuse of discretion. The trial court makes its determination after consideration of a number of factors, including the nature of the litigation, its difficulty, the

amount involved, the skill required in its handling, and other circumstances in the case. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1094-1096.)

Accordingly, the fee dispute between Development Company and its former counsel is but one factor to be considered by the court in awarding fees. After considering all the factors regarding attorney fees, the trial court reduced the claimed amount of attorney fees by 20 percent, awarding $186,185 instead of the claimed $239,853. We do not find the trial court abused its discretion in setting the amount of attorney fees awarded under Corporations Code section 317.

DISPOSITION

The judgment is affirmed. The order after judgment awarding attorney fees is reversed and the matter is remanded with directions to deny any award of attorney fees based on section 1354, subdivision (c) and to recalculate the award of attorney fees to eliminate the amount awarded under section 1354. Plaintiffs and cross-defendant Cicala shall recover costs on appeal.

RAYE, J.

We concur:

SCOTLAND, P.J.

NICHOLSON, J.